

*FCC Received July 3, 1996 @ 12:22 p.m.
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FEDERAL COMMUNICATIONS COMMISSION

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of:)	MM DOCKET No.: 96-104
)	
SOUTHWESTERN BROADCASTING)	File No.: BRH-900315UC
CORPORATION)	
)	
For Renewal of License for)	
Station KLZK (FM))	
Brownfield, Texas)	

C O R R E C T E D C O P Y

Volume: 2
Pages: 22 through 55
Place: Washington, D.C.
Date: June 27, 1996

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FEDERAL COMMUNICATIONS COMMISSION²²
OFFICE OF SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of: MM DOCKET No.: 96-104
SOUTHWESTERN BROADCASTING CORPORATION File No.: BRH-900315UC
For Renewal of License for
Station KLZK (FM)
Brownfield, Texas

Courtroom 4
FCC Building
2000 L Street, N.W.
Washington, D.C.

Thursday,
June 27, 1996

The parties met, pursuant to the notice of the
Judge, at 9:30 a.m.

BEFORE: HON. RICHARD L. SIPPEL
Administrative Law Judge

APPEARANCES:

On behalf of Southwestern Broadcasting Corp.:

LAWRENCE J. BERNARD, JR., ESQUIRE
5224 Chevy Chase Parkway
Washington, D.C. 20015
(202) 237-8215

On behalf of Federal Communications Commission:

KENNETH M. SCHEIBEL, ESQUIRE
Federal Communications Commission
Mass Media Bureau
2000 M Street, N.W.
Washington, D.C. 20554
(202) 418-1792

Heritage Reporting Corporation
(202) 628-4888

I N D E X

WITNESSES: DIRECT CROSS REDIRECT RECROSS DIRE

None .

E X H I B I T S

IDENTIFIED RECEIVED REJECTED

None .

Hearing Began: 9:30 a.m.

Hearing Ended: 10:36 a.m.

P R O C E E D I N G S

(9:30 a.m.)

JUDGE SIPPEL: Good morning.

MR. BERNARD: Good morning, Your Honor.

MR. SCHEIBEL: Good morning, Your Honor.

JUDGE SIPPEL: I'm assuming that the reporter has your names, Mr. Scheibel, and Mr. Bernard.

MR. SCHEIBEL: Yes, Your Honor.

MR. BERNARD: Yes, Your Honor.

JUDGE SIPPEL: I have called this conference at the request of the Bureau Counsel, as a result of a -- in response to a motion that was filed on June 21st, in which Mr. Scheibel requested this conference. Mr. Bernard was notified informally, and I appreciate your cooperation in getting this matter on the record as expeditiously as possible. Thank you. Mr. Scheibel.

MR. SCHEIBEL: Thank you, Your Honor, and I thank opposing counsel for being able to attend, and for the expediting of this as well. Your Honor, the reason that the Bureau requested this further pre-hearing is pursuant to developments since the prior order issued during the first pre-hearing, in that order, Your Honor, you asked us, Bureau Counsel, to cooperate to the extent possible with respect to the processing of Southwestern's modification application.

And it is in ascertaining the status of that

1 application, and what is to be done about it that we felt
2 that the need for a further prehearing arose.

3 The nature of the proceeding where we left it is
4 that we had discussed a proposed consent order pursuant to
5 negotiations under Section 1.93, and it appeared that those
6 negotiations were in large part predicated upon an
7 assumption that a modification application that was
8 proffered post-designation could be expeditiously processed
9 by the processing division of the Bureau.

10 We have since ascertained, counsel has since
11 ascertained that that will not take place. In light of that
12 development, we thought that it was incumbent to notify Your
13 Honor and opposing counsel, insofar as this might reshape
14 the issues in front of us.

15 JUDGE SIPPEL: Why do you say that -- what has
16 changed between the earlier conference of June 6th and today
17 to warrant that position on the Bureau's part?

18 MR. SCHEIBEL: We were attempting since the time
19 of that conference to ascertain whether expedited processing
20 pursuant to the Commission's order concerning the silent
21 station modification applications would be germane to this
22 particular factual scenario.

23 Counsel has been advised that the processing
24 division of the Bureau will not process on an expedited
25 manner that applications which were first proffered post-

1 designation in the silent station cases. So, that was the
2 policy determination that arose subsequent to our last pre-
3 hearing, Your Honor, and as soon as this development
4 unfolded, I proceeded with the motion for a further pre-
5 hearing.

6 JUDGE SIPPEL: What is the rule that you are
7 referring to? Can you give me a cite on that rule? You
8 might have done that earlier, but give it to me again,
9 please.

10 MR. SCHEIBEL: Your Honor, the rule on the pre-
11 hearing?

12 JUDGE SIPPEL: No, the rule on the silent station
13 modification.

14 MR. SCHEIBEL: The silent station modification was
15 a public notice, Your Honor. We are -- the first pre-
16 hearing was predicated upon understanding that
17 Southwestern's post-designation modification might be
18 subject to the expedited processing procedure pursuant to
19 the Commission's, I believe, May 22 notice. And that was
20 recited in Your Honor's order.

21 JUDGE SIPPEL: Okay. I see what you are referring
22 to. All right.

23 MR. SCHEIBEL: And in attempting to ascertain
24 whether the situation that was presently in front of us
25 would fall subject to that, as I have indicated, we ran into

1 a policy determination that was relevant to Southwestern's
2 position in this case.

3 So, we felt in good faith that we needed to alert
4 Your Honor and opposing counsel of that discovery, so as to
5 revisit any other issues that might arise in that
6 development.

7 And to the extent that that has caused any delay,
8 as I said, we went forward with this as soon as this
9 determination was made, and I'm sorry for any -- the Bureau
10 is sorry for any unnecessary delay in this case, but we
11 believe that that is a position upon which we cannot
12 negotiate.

13 JUDGE SIPPEL: You know, you say that you can't --
14 that it can't be expedited because the criteria are not met
15 for expediting?

16 MR. SCHEIBEL: That's correct, Your Honor. The
17 Bureau has interpreted the Commission's public notice as not
18 pertaining to post-designation modification applications.

19 JUDGE SIPPEL: All right. I understand what you
20 are saying, but you don't feel that you don't have any
21 leeway of going outside of that in the context of a hearing
22 on it; and we are in a hearing, and we are trying to resolve
23 this thing in an expeditious fashion.

24 There is a procedure for doing that, and yet you
25 feel that you are bound by this policy.

1 MR. SCHEIBEL: Your Honor, counsel and all
2 involved have spent many hours in many meetings following
3 your line of reasoning, and exploring possibilities in this
4 situation.

5 And I am simply here to advise that the Bureau is
6 not willing to afford any leeway on factual scenarios such
7 as Southwestern's.

8 JUDGE SIPPEL: All right

9 MR. SCHEIBEL: And that's been the policy
10 determination that has been made, and I am bound by it.

11 JUDGE SIPPEL: All right Well, having said that
12 then, what is your argument, or what is your position, the
13 Bureau's position, with respect to where we go from here?

14 MR. SCHEIBEL: Well in following up on that, it
15 seems to me that the underlying predicate for negotiation
16 and settlement is probably in this case no longer relevant,
17 unless of course we are mistaken on the facts, and
18 Southwestern is able to expeditiously resume broadcasting
19 without reference to the particular modification application
20 and question.

21 I assume that is not the fact. I assume that the
22 implementation of the post-designation modification
23 application is critical to the expeditious resumption of
24 broadcasting of Southwestern's Station KLZK. It appears to
25 me that all that we are left with then after this is going

1 forward toward a motion for summary decision if Southwestern
2 reveals to us that they cannot return to the air absent that
3 modification.

4 And then we are back to the hearing designation
5 orders issues, and that is specifically whether in light of
6 the events then to that point at the time of designation,
7 Southwestern had demonstrated that it had the capability,
8 intent, and ability to expeditiously resume broadcasting.

9 And we are back into the issue of whether its
10 prosecution of its applications and its maintenance of its
11 license during the last period was dilatory, or in good
12 faith.

13 And they will probably put on evidence to support
14 their side, and we will comment on that evidence, and that's
15 where we will be left.

16 JUDGE SIPPEL: Well, you certainly are --
17 potentially this could become a rather expensive proceeding,
18 and in the alternative, the scene that we were exploring
19 last time seems to be an awful lot more oriented towards the
20 Commission's philosophy of getting these cases moved along,
21 and get these things on the air.

22 MR. SCHEIBEL: I am aware of that, Your Honor, and
23 to the extent that my surmise at the first pre-hearing was
24 in keeping with what I ascertained as existing policy at the
25 time, I thereafter learned very soon that that was not the

1 position of the Bureau.

2 And so I felt that in spite of our discussions
3 where these points were taken up, this is the position of
4 the Bureau in these particular cases.

5 JUDGE SIPPEL: Well, it is obviously a surprise to
6 me, and I think it is even more of a surprise to Mr.
7 Bernard. I am going to have him address this in course and
8 his views. But this is not one of the big networks that we
9 are dealing with here, and this owner is going to have to
10 compensate Mr. Bernard for his time.

11 And listening to what you are saying here, we just
12 wasted a heck of a lot of time the last time we met. And I
13 am not directing that personally to you, but I think it is
14 appropriate to be said on the record that this is not the
15 way the Commission likes to have its work done.

16 But you tell me -- I am not going to ask you to
17 respond to that now, but what I -- but what you're saying is
18 that -- well, I heard what you said. What we have here is a
19 situation where in order to -- to sum up, it is my
20 understanding that there is a Class A station that is trying
21 to get changed over to a Class II in order to make this
22 economically viable to put on the air. That is essentially
23 what the hearing designation order says; is that correct?

24 MR. SCHEIBEL: There are underlying facts that the
25 Bureau has put into question as to whether the efforts to

1 resume broadcasting during a multi-year period were
2 dilatory, or in good faith, and the Bureau's determination
3 upon the record in front of it is that Southwestern had been
4 dilatory, and therefore, the renewal of license application
5 should not be granted.

6 Or that it raised questions as to the grantability
7 of it.

8 JUDGE SIPPEL: Well, you would be open to seeing
9 what their position is on, say on motion papers, with
10 affidavits and this type of thing. You are not locked into
11 that position are you?

12 MR. SCHEIBEL: It would depend on -- yes, what is
13 revealed to us in writing.

14 JUDGE SIPPEL: All right. Now, have you
15 explored -- well, all right. Never mind. Let me ask Mr.
16 Bernard to address this situation. And obviously what we
17 want, and what we have to decide this morning is how do we
18 next proceed on this case.

19 MR. BERNARD: Your Honor, we have a problem which
20 none of us can really deal with, and that is the amendment
21 to the Communications Act, which says that if you have been
22 silent for a year come February of next year, your license
23 is revoked. I mean, you just -- and that's lurking in the
24 back of my mind as a problem.

25 I have asked Bureau Counsel if some step has been

1 made to delay processing of application such as Brownfield.

2 MR. SCHEIBEL: All I can say is that I am not
3 aware that the proffered application is subject to present
4 processing. It certainly -- not under expedited processing,
5 absent expedited processing, and I don't think there is any
6 processing contemplated. So, in light of that --

7 MR. BERNARD: What does that mean?

8 MR. SCHEIBEL: Is that the processing division is
9 not going to be acting on the post-designation modification
10 application.

11 JUDGE SIPPEL: So, you put a hold on that
12 application; is that correct?

13 MR. SCHEIBEL: I have not put a hold on the
14 application. I have been advised that the processing
15 decision has put a hold on that application, and that
16 affects our proceeding.

17 MR. BERNARD: That makes it impossible, Your
18 Honor, to do anything here. The licensee, renewal
19 applicant, has been foreclosed from operating on either
20 Channel 280, which was his original frequency, or Channel
21 282, since 1987, I believe, when the FCC granted an STA for
22 a station of Channel 284C of Lamesa, Texas, to begin
23 operations.

24 That STA operation has ceased within the last week
25 pursuant to a number of procedures in which Brownfield, or

1 excuse me, in which Southwestern was a party.

2 But they have been hamstrung the whole time, and
3 now when they finally get a place where their application
4 could be granted, the Commission says we are not going to
5 act on it. It is really an impossible situation. If they
6 want to take us off the air, why don't they just do it by
7 the Act.

8 MR. SCHEIBEL: Your Honor, the issue that we are
9 left with is precisely that, but obviously not to be
10 resolved this morning as to -- counsel for Southwestern
11 obviously intends to characterize the factual underlayment
12 of the hearing designation order as erroneous, but the
13 Bureau is standing by its hearing designation order.

14 And so therefore we believe that it was the
15 actions -- that the hearing designation order drew the line
16 in the sand, and it was the actions and omissions by the
17 renewal licensee prior to the hearing designation order that
18 are relevant to the designation questions.

19 And that resulted in the HDO being issue in the
20 first place.

21 JUDGE SIPPEL: Well, what about -- is the new
22 owner, is the Southwestern owner answerable for the dilatory
23 -- for the assumedly or the allegedly dilatory conduct of
24 the prior owner, the Brownfield owners?

25 MR. SCHEIBEL: May I speak to that, Your Honor.

1 JUDGE SIPPEL: Yes. That's why I'm asking.

2 MR. SCHEIBEL: As a matter of -- and you will find
3 it reflected in the Commission's conditions with respect to
4 assignment of unbuilt construction permits, they are always
5 made conditional as to expeditious processing of taking
6 steps necessary to implement those unbuilt construction
7 permits as a condition of the assignment, which is why the
8 rules speak to time periods under which you are able to
9 freely assign construction permits; the first nine months
10 under the rules.

11 And I believe that it is Section 73.3535, or 3534,
12 which speaks to the nine month rule. Outside of the first
13 nine months, because the rules contemplate some dilatory and
14 bad faith behavior by permittees who do not intend to
15 construct, if they assign a construction period permit
16 outside of that period, they have to make a showing.

17 And the grants of such applications are always
18 conditioned upon a construction plan. Now, if further
19 extensions of time to construct become necessary to the new
20 assignee of the permit, the Commission always entertains
21 further construction permit extension applications on a case
22 by case basis.

23 But they have to meet the one and three showing
24 under the rules as to why circumstances beyond their control
25 precluded construction during the relevant period. The

1 Bureau's position is that in the litany of construction
2 permit applications, and the long period of time that has
3 passed in the hands of the former licensee and the present
4 permittee, that those burdens have not been met in this
5 case.

6 As I said, further amplification on those matters
7 is best done in papers to the Court, Your Honor.

8 MR. BERNARD: Your Honor, we never had a
9 construction permit. We still don't have a construction
10 permit. If we had a construction permit, we could be on the
11 air in 90 days.

12 JUDGE SIPPEL: You've got an application pending,
13 but you don't have the permit?

14 MR. BERNARD: That's correct. We've never had a
15 permit; and the reason that we haven't had a permit is that
16 we couldn't file for a permit because the database had this
17 other station in it that blocked us.

18 JUDGE SIPPEL: When you say we, you are talking
19 about the present --

20 MR. BERNARD: My client, that's correct, Your
21 Honor.

22 JUDGE SIPPEL: Your argument has nothing to do
23 with what Brownfield was doing?

24 MR. BERNARD: No, Your Honor.

25 MR. SCHEIBEL: Even if we conceded the fact that

1 they have not filed the necessary application to go forward
2 in light of any delays, the Bureau's position on that is
3 that the failure of Southwestern to file or implement prior
4 to designation the necessary construction permit application
5 constitutes in and of itself the dilatory behavior that has
6 resulted in a hearing designation order.

7 But I really don't believe that it is valuable at
8 this point to pursue this further, because these are points
9 for -- as I said, further briefing papers, or comments. I
10 anticipate that the Bureau will comment to any motion for a
11 summary decision that Southwestern would file, and we will
12 examine its assertions, and go forward from there.

13 MR. BERNARD: Well, I gather the Bureau has
14 retreated from its position that it would negotiate a
15 consent order?

16 MR. SCHEIBEL: That's correct.

17 MR. BERNARD: Now, if we can't resolve this
18 proceeding by February 1, or February 7, or whatever the
19 date is of next year --

20 MR. SCHEIBEL: February 9 probably, I believe.

21 MR. BERNARD: And the way the Commission's time
22 frames for processing things go that would be completely in
23 the Bureau's hands. We could get, for example, and worst
24 case or best case, or whatever, and I'm not trying to say
25 what we might be.

1 But we could get a favorable ruling by the Judge,
2 and the Bureau could carry it through appeals with us having
3 never constructed on, and our license would be gone. Is
4 that what the Bureau contemplates?

5 MR. SCHEIBEL: The Bureau contemplates responding
6 to whatever motion you put forward. If the facts as
7 portrayed in the hearing designation order stand up to the -
8 - to your assertion of the facts, we will file comments on
9 that.

10 If the hearing designation order doesn't stand up,
11 we will have to explore it from there, but I can't
12 contemplate any particular schedule right now. And the
13 Bureau is aware of the legislation that takes this matter
14 out of its hands that goes into effect by operation of law
15 in February of '97.

16 But once again a line was drawn -- the Bureau's
17 position is that a line was drawn in the sand at the
18 designation for hearing of Southwestern's renewal
19 application.

20 JUDGE SIPPEL: Well, let me ask you this. Would
21 the Bureau -- if we do down this -- I'm assuming that we are
22 going to go down this road now with a summary decision, and
23 if I were to grant a summary decision, let's say, in favor
24 of Southwestern, would the Bureau or -- well, it doesn't
25 make any difference really which way it comes out, as there

1 is going to be an appeal.

2 But would the Bureau join in a request that the
3 Commission expedite the review?

4 MR. SCHEIBEL: We can't answer that at this time,
5 Your Honor, but any scenario we would take under
6 consideration.

7 MR. BERNARD: Well, Your Honor, it seems to me
8 that the Bureau has become the Judge in this kind of
9 situation. If they want us off the air, they can delay the
10 proceeding, and the statute comes in, and our neck is up.

11 MR. SCHEIBEL: The Bureau's position is that it
12 was not the Judge in this case. It was the actions of the
13 renewal licensee that resulted in the hearing designation
14 order.

15 MR. BERNARD: If I can demonstrate to the
16 satisfaction of the Judge that that is not the case. I
17 mean, my problem is getting -- if I could get the
18 application granted, we could be on the air. I assume the
19 Bureau wants service to the public.

20 MR. SCHEIBEL: In the general --

21 MR. BERNARD: But in the absence of that --

22 JUDGE SIPPEL: Let him finish. Let him finish.

23 MR. SCHEIBEL: I'm sorry, Your Honor.

24 MR. BERNARD: In the absence of that, there really
25 is no point in having a hearing because we don't know where

1 we're going. If somebody gets sick in the hearing division
2 and can't write the findings, or somebody at the Commission
3 delays in issuing a decision, and February 1 comes, all of
4 this is meaningless. It's moot.

5 MR. SCHEIBEL: Your Honor, the Bureau's response
6 to that is that we probably are ready to go forward and
7 entertain a motion for summary decision at this point, and
8 if Your Honor wants to schedule comments to that, we will do
9 what we can to play our part in getting this thing resolved
10 one way or the other at the earliest time.

11 We are not trying to drag this out with a hearing
12 with meaningless evidence or exhibits if it is going to be -
13 - if it can be resolved on paper.

14 JUDGE SIPPEL: Well, it -- I can identify with Mr.
15 Bernard's frustration at this. I don't know whether
16 anything further is going to be revealed at this conference.
17 I don't know -- I mean, I have a general awareness, in terms
18 of what has been circulated in terms of this
19 Telecommunications Act, and the impact it is going to have
20 on here.

21 I don't have it defined in my own mind that there
22 is absolutely no discretion that the Commission has under
23 the Act, in terms of what it can do on a case by case basis.
24 What I am hearing here is that it seems from both sides of
25 the table that you are both under the assumption, anyway,

1 that it is just automatic, and that it is a drop dead date
2 under the Telecommunications Act, February 9th.

3 MR. BERNARD: That's the way that I read it, Your
4 Honor.

5 JUDGE SIPPEL: There is absolutely no discretion
6 that any Agency has at any level to take a special set of
7 factors into consideration. That's what I'm hearing; is
8 that not correct?

9 MR. SCHEIBEL: Your Honor, may I comment to that?

10 JUDGE SIPPEL: Yes.

11 MR. SCHEIBEL: That's what we perhaps foresee, and
12 something that I suppose the Court of Appeals will one day
13 have to take up as to what Congress meant with respect to
14 that legislation. That doesn't appear to carve out
15 exceptions.

16 But we really aren't in the position to override
17 Congress' direct legislation on this. But we can already
18 see on the horizon certain cases that may be ripe for a
19 court review to clarify all that. But that's really not
20 germane to where we are going today.

21 MR. BERNARD: Well, there's another problem, Your
22 Honor. If we resolve this proceeding, even if it is
23 favorable to Southwestern, then we still don't have a
24 construction permit.

25 JUDGE SIPPEL: Well, I understand that.

1 MR. BERNARD: And since somebody has got to
2 process it, and I assume that we would get the cooperation
3 of the Bureau to process it, but there is no cooperation
4 that is being indicated here this morning. As a matter of
5 fact, what they are saying is that -- well, what I'm hearing
6 is -- well, you know, we're not going to have a hearing.

7 We have designated you for a hearing, and we can
8 control the hearing, and therefore, you are dead.

9 JUDGE SIPPEL: Well, you don't have to respond to
10 that. If you have an argument to make to me -- I think the
11 Bureau has stated its position; is that correct?

12 MR. SCHEIBEL: That's correct, Your Honor.

13 JUDGE SIPPEL: I hear you. Now, my order is still
14 outstanding. Well, let me go back to my order, but I have
15 -- this is 96M-151, where I have urged the Bureau to
16 expedite filings. Now I am being told that that urging at
17 my -- well, that my urging is not going to be honored by the
18 Bureau.

19 I take it that the Bureau feels that it is bound
20 by a policy of the Commission that they can't cooperate in
21 that effort?

22 MR. SCHEIBEL: That's correct, Your Honor.

23 JUDGE SIPPEL: All right. Well, then I can't
24 obviously -- I can't obviously order the Bureau to do what
25 it feels is contrary to Commission policy because you are

1 not going to do it.

2 But I think that the -- I am not going to amend
3 anything that I have said up until this point in the event
4 that Mr. Bernard's client wants to take this outside the
5 Commission. I'm not suggesting that you do, or what you do,
6 but I think that -- I mean, it sounds like you are
7 definitely in the vernacular of caught between a rock and a
8 hard place.

9 And there is no relief that I can give you right
10 here today. We have a -- I think we just have to turn to
11 scheduling matters. The best that I can do is to rule on a
12 motion for summary decision, and whatever ruling make, there
13 is no longer a review board intermediary.

14 You can go right up to the Commission with
15 whatever I do, or I suppose you could go up to the
16 Commission for some kind of emergency relief, in terms of
17 the impact of its policy on your situation. You can do that
18 simultaneously with what I'm doing.

19 Again, I don't want to be in the position of
20 advising or recommending any particular course of action,
21 but it just seems to me that there is a range of remedies.
22 How success they would be, you know, I have absolutely no
23 idea.

24 But there are a range of options that the
25 applicant party has. But those options -- the options

1 before me are considerably more narrow. Now, I don't know -
2 - well, again, let's go back to where we are.

3 We have a -- my outstanding order says that by
4 July 15th there is either going to be a proposed consent
5 order or a motion. That date still stands. I want to make
6 two qualifications to that. First of all, since Mr. Bernard
7 came in here at the last conference unaware of this policy
8 interpretation of the Bureau, obviously he was not in a
9 position to address what we are addressing this morning.

10 So, the point that I am getting at is that if you
11 want more time to get your papers in, I will be amenable to
12 giving you more time. However, let me point this out on the
13 other hand. I think I might have advised you off the
14 record, but I should advise you on the record, that I have
15 to leave the country on the 26th of July in order to attend
16 my daughter's wedding outside the United States.

17 And I'm not going to be returning to the United
18 States until the 19th of August. If you want to move this
19 schedule up -- and this is up to you, Mr. Bernard, because
20 if you want to get something to me earlier than July 15th,
21 then I would move the comment period to an earlier date in
22 order to allow me to rule on this before I leave.

23 In other words, get a ruling on this by the end of
24 July. Whichever way it goes, at least that would -- you
25 know, it would be a factor of three weeks at least. And

1 that's all that I can do.

2 I don't have any other discretion as I see it to
3 do anything else. I can only accommodate you as best I can.

4 Now, if you want to talk to counsel about this, and get
5 back to me, or if you want to make a decision today on the
6 dates, I'm here to do it.

7 We can recess if you want to talk, and I can come
8 back in here, and we can work out a schedule. Do you have
9 any position at this time, or do you have any alternative
10 procedures that you would be advocating this morning or
11 recommending?

12 MR. BERNARD: Well, it's very difficult, Your
13 Honor. In the normal new applicant proceeding, for example,
14 you would have some control over the filing of an amendment
15 in the issuance of a construction permit, and that kind of
16 thing. Here I'm -- the prosecutor has the last word here,
17 and I just -- and I'm wondering from what I'm hearing about
18 the prosecutor's -- you know, I don't feel individually
19 paranoid for my client.

20 I feel like I'm caught up in a policy shift here,
21 which basically says that anybody that wasn't built before
22 the construction permit went down is going to suffer at the
23 hands of the new Telecommunications Act, because I can't get
24 it all done within the time frame that is left before the
25 hammer drops in February.

1 There is just no way we can get it done. You
2 can't order the Bureau to do anything I gather, and if --
3 and so my prosecutors, they have the full power of whether
4 or not to process the application, and issue me a
5 construction permit.

6 MR. SCHEIBEL: Well I dispute that, Your Honor.

7 JUDGE SIPPEL: Why is that?

8 MR. SCHEIBEL: Because what's relevant to the
9 renewal proceeding are those actions that occurred in the
10 prosecution of the renewal prior to designation. Those are
11 the operative facts.

12 If the operative facts -- if counsel for
13 Southwestern believes that the operative facts are in his
14 favor, and support grant of the renewal, then he should try
15 to demonstrate that with a motion for summary decision. If,
16 however, he is arguing that implementation of that
17 modification application that was first proffered post-
18 designation is essential to that showing, we would dispute
19 the propriety of that.

20 MR. BERNARD: It is not essential to the showing.

21 JUDGE SIPPEL: What just a second.

22 MR. BERNARD: Excuse me.

23 JUDGE SIPPEL: Wait just a second. We are talking
24 about two different things here. You are talking about
25 getting to the ultimate -- to the litigation of the issues